SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5026

BILLY RAY WILLIAMSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, State of Alabama, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Alabama opinion in this case. That opinion is reported at 370 So. 2d 1066 (1979).

QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE IS VIOLATIVE OF THE CONSTITUTION FOR FAILING TO ALLOW A JURY TO RETURN A VERDICT ON A LESSER INCLUDED OFFENSE?

II.

WHETHER THE ALABAMA DEATH PENALTY STATUTE IS A MANDATORY STATUTE WHICH ALLOWS DE FACTO JURY SENTENCING DISCRETION?

III.

WHETHER UNDER ALABAMA'S DEATH PENALTY STATUTE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE TRIAL JUDGE IN DETERMINING WHETHER A DEFENDANT SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT WITHOUT PAROLE MUST BE PROVEN BEYOND A REASONABLE DOUBT.

IV.

WHETHER THE "STACKING" OF IDENTICAL AGGRAVATING CIRCUMSTANCES AND THE USE OF THAT AGGRAVATING CIRCUMSTANCE WHICH WAS AN ELEMENT OF THE CRIME RENDERS THE SENTENCING PROCEDURE EMPLOYED IN THIS CASE SUFFICIENTLY UNRELIABLE TO INVALIDATE PETITIONER'S DEATH SENTENCE?

V.

WHETHER THE ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER TO POLICE DURING QUESTIONING FOLLOWING A REQUEST BY PETITIONER FOR COUNSEL AND THEN A WAIVER OF COUNSEL PRIOR TO QUESTIONING VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS?

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Appellant, Billy Ray Williamson, was indicted by the May, 1977 Term of Morgan County Grand Jury for the offense of kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant. This indictment was brought under Title 15, Section 342 (3-11), Alabama Code 1940 (1975 Interim Supp.) The Appellant filed a Motion to Quash and a demurrer to the indictment both of which were overruled by the trial court (R. pp. 1023-1025, 1031). The Appellant was arraigned on June 27, 1977 at which time he entered a plea of not guilty (R. p. 1031).

The case came to trial on August 20, 1977 (R. p. 1032). On August 30, 1977 after voir dire examination of prospective jurors but before beginning to strike the jury, the Appellant moved for a continuance or mistrial on the grounds of prejudicial pre-trial publicity (R. pp. 441-444, 524-532).

The jury returned a verdict of guilty on September 1, 1977 and fixed his punishment at death as required by law (R. p. 1032). On September 14, 1977 a hearing was held by the trial judge to determine the sentence to be imposed (R. pp. 926-1015). On September 15, 1977 the Court sentenced the Appellant to death by electrocution (R. p. 1016). The Court on September 15, presented its written findings of fact upon which the sentence of death was based (R. pp. 1033-1036). On April 4, 1978 the Court of Criminal

Appeals affirmed the action of the trial court. Appellant's Application For Rehearing was overruled on May 2, 1978. Appellant's Petition for Writ of Certiorari was granted by the Alabama Supreme Court on July 25, 1978. On January 5, 1979 the Court affirmed the conviction and sentence of Williamson. Rehearing was denied on February 9, 1979.

STATEMENT OF THE FACTS

The Appellant, Billy Ray Williamson, and his brother-in-law, Bradley Jackson, in April of 1977, devised a scheme to kidnap Jessie I. Davenport for whom the Appellant worked and hold him for ransom (R. p. 901). On Monday, April 25, 1977 the Appellant and Jackson stopped Jessie Davenport's truck as he left his residence and the Appellant got in the truck with Jessie Davenport (R. p. 902). They drove to Mr. Davenport's son's office where they told one of the employees they were going to Kimberly Trailer Court (R. pp. 902, 548-550). The Appellant and Mr. Davenport drove to Kimberly Court in Mr. Davenport's truck and Jackson followed in his Dodge Charger (R. p. 902).

Once at the sewage plant after they started to work, the Appellant struck Davenport on the head with a piece of pipe (R. p. 902). The Appellant and Bradley put Davenport's body in the trunk of Bradley's car (R. p. 903). They parked Mr. Davenport's truck in the parking lot at Big K where it was later found by employees of Mr. Davenport's son (R. pp. 903, 577). The Appellant and Bradley then drove around for a time until they found a remote area near Crane Hill where

they put the body of Mr. Davenport (R. p. 903). They threw a sheet over the body and also took a piece of carpet and a small pillow out of the car and threw them across the road from where they put the body (R. pp. 903-906).

They drove towards Birmingham (R. p. 904). They stopped at a phone booth and Bradley called Jessie Davenport's son to demand a ransom of One Hundred Thousand Dollars ($100,000.00) (R. pp. 904-571). Jessie Davenport's son received a second call around 7:20 p. m. on April 25 at which time he was told to put the money in the brochure box at Rivermont Oaks (R. pp. 905, 573).

Around 8:00 p. m. on April 25, 1977 the Appellant asked Andrea Locsier if she would pick up a package for him (R. pp. 581-583). She refused to do so (R. pp. 584-585). Around 10:00 p. m. on April 25, the Appellant approached Bobby Albrecht and asked him if he wanted to take a ride (R. p. 591). The Appellant and Albrecht drove out to Cotaco where they were building a new project and the Appellant got out of the car (R. p. 593). Albrecht drove around for about twenty minutes, then picked the Appellant up and they drove back to the trailer court (R. p. 593). The next day the Appellant approached Albrecht and asked him if he wanted to make Twenty-Five Thousand Dollars (R. p. 597).

The Appellant was questioned by police on Tuesday night and Wednesday morning (R. p. 909). Jackson's car was searched on Wednesday and blood and hair samples were found in the trunk which were determined by State Toxicologist Brant Wheeler to match Davenport's (R. pp. 616-623, 705-732).

The body of Jessie Davenport was found on Thursday, April 28, in Cullman County (R. p. 643). State Toxicologist James Buttrem testified that death was caused as a result of miltiple blunt force damage delivered to the head (R. pp. 689-690).

A hearing was held outside the presence of the jury at which time testimony was given on the question of whether a statement given to police by the Appellant should be admitted into evidence (R. pp. 752-885). The Appellant was taken into custody at his mother's home by his brother, Jimmy Williamson (R. p. 811). The Appellant was advised of his rights by Jimmy Williamson and taken to DeKalb County Sheriff Bill Ables' house (R. p. 811). The Appellant was then taken to the DeKalb County Jail and from there to Decatur (R. pp. 811-814). When they arrived at the Decatur Police Station they were met by Detective Clark, Detective Collier, and Sergeant Ward (R. p. 756). Jimmy Williamson was allowed to talk to his brother for about ten to fifteen minutes after arriving at the Decatur Police Station (R. pp. 757, 815). Jimmy Williamson testified that after talking to his brother he told Sergeant Ward that the Appellant wanted an attorney (R. p. 817). Jimmy Williamson also testified that earlier his brother had stated that he would need a good lawyer (R. p. 816).

Detective Collier and Clark then talked to the Appellant and after advising him of his rights and after the Appellant signed a waiver of rights form they took a statement from the Appellant (R. pp. 751-763). No threats or promises were made to the Appellant to get him to sign the waiver form (R. pp. 751-763).

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Alabama statute does not permit a jury to return a guilty verdict for a lesser included offense and in that way effectively prevents the infrequent and arbitrary imposition of death sentence forbidden by the Constitution. The absence of lesser included offenses will not make it likely that jurors will sentence to death persons who do not deserve so harsh a penalty. Such a result would require the jurors to violate their oaths, to ignore the instructions of the trial judge, and to act in a manner contrary to the historical behavior of juries.

The Alabama death penalty statute does not provide a mandatory death sentence for persons convicted of a capital offense. A guilty verdict is only the first of two steps and it is in the second part, the sentence hearing, that the defendant's punishment is set. The requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task thus emphasizing the need for accurate, impartial fact finding. The Alabama statute also avoids the problems of de facto sentencing discretion through jury nullification by precluding consideration of lesser included offenses in capital cases.

The Alabama death penalty statute requires that before an individual can be convicted of a capital offense one

aggravating circumstance must be proven beyond a reasonable doubt. The sentencing hearing held by the trial judge is not a hearing to determine if an aggravating circumstance exists, but a hearing to weigh aggravating and mitigating circumstances in order to determine what sentence is appropriate.

The trial judge in the instant case weighed the nature of the aggravating circumstances against the nature of the mitigating circumstances in determining what sentence to impose. Thus the fact that one underlying aggravating curcumstance was considered twice does not render the sentencing procedure so unreliable as to invalidate petitioner's death sentence.

A suspect may after having requested counsel waive his right to counsel prior to being questioned by police. The admission into evidence of a statement made to police during such questioning does not validate the Fifth or Fourteenth Amendments.

ARGUMENT

A STATUTORY PROVISION THAT PROHIBITS A JURY FROM RETURNING A VERDICT ON A LESSER INCLUDED OFFENSE IS NOT UNCONSTITUTIONAL

Under the Alabama statute's carefully drafted definitions of capital crimes there are no lesser included offenses. Code of Alabama 1975, § 13-11-2(a). While this Court has not held in post-Furman v. Georgia, 408 U. S. 238, cases that the preclusion of lesser included offenses is constitutionally required, it does not follow such preclusion is an unconstitutional method of seeking to obtain the type of sentencing which various members of the Court felt important in Furman.

In Furman, the way in which death penalty statutes had been applied in the past was held to be unconstitutional, because that application: was "pregnant with discrimination", 408 U. S. at 257 (Justice Douglas, concurring); permitted the death penalty to be "wantonly" and "freakishly" imposed, 408 U. S. at 310 (Justice Stewart, concurring); and resulted in the death penalty being imposed with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," 408 U. S. at 313 (Justice White, concurring). The preclusion of lesser included offenses is the most effective means of insuring that de facto jury discretion does not make the operation of a death penalty statute "pregnant with discrimination" because it is imposed with such "great infrequency" as to be "wantonly" and "freakishly" imposed.

Because of this, preclusion of lesser included offenses avoids the pitfalls denounced in Furman, and thereby promotes sentencing that is consistent with the Constitution.

No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of easy de facto discretion which the availability of lesser included offenses provides, the greater consistency of judicial sentencing and appellate review of sentencing will always be undermined. See, Roberts v. Louisiana, 428 U. S. 325, 335 (1976) (plurality opinion). In the terms of a metaphor used in Woodson v. North Carolina, 428 U. S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion. Of course, Roberts and Woodson involved mandatory statutes. While the papering-over job might render the defect somewhat less apparent in non-mandatory schemes, defects still remain beneath the surface whenever a jury has lesser included offenses available as an alternative to capital sentencing.

In his brief Petitioner speculates that the preclusion of lesser included offenses might cause juries to convict a defendant of a capital offense, when that defentant was merely guilty of a lesser offense which should have been but was not included. Such speculation is unpersuasive for three reasons. First of all, there is absolutely no indication or evidence that such cold-hearted irresponsibility has ever occurred or will ever occur. In this case, the trial court judge instructed the jury that they would have to be convinced beyond a reasonable doubt of the existence of all elements of the capital offense with which the petitioner was charged

before they could convict the defendant (R. pp. 948 - 970). The jurors were properly instructed on this point, and "it should not be assumed that juries will disobey or nullify their instructions." Jurek v. Texas, 428 U. S. 262, 279 (1976)) (Concurring opinion of Justice White, joined by Chief Justice Burger and Justice Rehinquist).

The second reason why Petitioner's argument is unpersuasive is that historical experience directly contradicts it. The available evidence indicates that because of compassion, juries tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U. S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the face of such evidence, Petitioner's argument that jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is without any support.

The third reason why Petitioner's argument is unpersuasive is that it incompletely states the facts. If the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, § 13-11-2(c).

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required.

Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. All of the historical evidence concerning the behavior of juries in capital cases is to the contrary. In any event, the Alabama statutory system contains an important safety-valve in tht a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be re-tried for the capital offense or he can be reindicted for a non-capital offense.

II.

THE STATUTE IS NOT A MANDATORY DEATH PENALTY ACT, AND WHILE IT OPERATES TO INSURE THAT JURY VERDICTS WILL BE RELIABLE, IT DOES NOT PERMIT DE FACTO SENTENCING DISCRETION

The only mandatory aspect of Alabama's statute is that it mandatorily requires that the trial court hold a post-conviction sentence hearing to carefully weigh aggravating and mitigating circumstances before deciding on the sentence. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978). The jury's function is to find guilt or innocence. Jacobs v. State of Alabama, 361 So. 2d 697, 631 (Ala. Cr. App. 1977). A jury verdict of guilty is a necessary step in the sentencing process, but the judge is the sentencing authority, not the jury. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978).

Even though the jury is required to phrase any guilty verdict in terms referring to the punishment of death, this

is only an adjudication of guilt. No sentence exists until the judge pronounces one after he has held the post-conviction sentence hearing. Beck v. State of Alabama, 365 So. 2d 985 (Ala. Cr. App. 1978).

Even though the jury is not the sentencing authority, the requirement that any guilty verdict it return "fix the punishment at death" serves a very important function. As the plurality pointed out in Gardner v. Florida, 430 U. S. 349, 357-358 (1977) (Opinion by Justice Stevens, joined by Justice Stewart and Justice Powell), five Members of the Court have recognized that for constitutional purposes death is a punishment different from any other. Because of the profound difference between death and other punishments, greater reliability is necessary. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable if it helps insure that jurors vote to convict only those defendants whose guilt the jurors are truly convinced of beyond a reasonable doubt and to a moral certainty. The best way to insure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment of death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to "pass the buck" to the judges runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury believing that the "buck stops here" has more reason to realize its awesome responsibility and to discharge it with care.

The Court's decisions in Woodson v. North Carolina, 428 U. S. 280 (1976), and Roberts v. Louisiana, 428 U. S. 325 (1976), are not authority for invalidating Alabama's new Death Penalty Act. On page 16 of his brief, Petitioner appears to concede that only one of the grounds relied upon by the pluralities in Woodson, supra, and Roberts, supra, is even arguably applicable to Alabama's statute. That ground is that juries night exercise a "de facto sentencing discretion" which would lead to unconstitutional arbitrariness and capriciousness in the infliction of the death penalty. Woodson v. North Carolina, 428 U. S. at 302-303. However, the Alabama statute is constitutionally different from the North Carolina and Louisiana statutes which were struck down in Woodson and Roberts. Those statutes were seen as permitting or even encouraging jurors to use de facto sentencing discretion through the device of convicting for lesser included offenses. Indeed, the Louisiana statute requires that juries be instructed on lesser included offenses even when the evidence would not support such an instruction. Roberts v. Louisiana, 428 U. S. 325, 334-335 (1976). Such death penalty stututes "simply papered over the problems of unguided and unchecked jury discretion." Woodson v. North Carolina, 428 U. S. 280, 302 (1976) (plurality opinion).

Petitioner's argument is that the Woodson and Roberts cases are authority for the proposition that under Alabama's statute juries will ignore their instructions and fail to convict guilty defendants of a capital offense, and that this nullification will occur with such regularity that the operation of the statute will be arbitrary and capricious. This argument is wrong, because Alabama's statute is different

from the North Carolina and Louisiana statute. The most important difference is that Alabama's statute contains no lesser included offenses. Code of Alabama 1975, § 13-11-2(a). Jury nullification through lesser included offenses is not possible under the Alabama statute. Instead, the only possibility for jury nullification is through acquittal.[1] The offenses which are punishable by death under the Alabama statute are very narrowly drawn to include only the most serious and dangerous crimes. There is simply no real prospect that a jury convinced beyond a reasonable doubt that a person had committed such a serious and dangerous crime would ignore their instructions and let that person go free. There is no historical evidence to indicate that a jury would act in such a fashion.

The historical evidence relied upon in Woodson and Roberts to predict that those two statutes would operate capriciously does not support such a prediction concerning the operation of Alabama's statute. First of all, the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. Secondly, Alabama's statute does not permit the exercise of de facto jury sentencing discretion through the device of convictions for lesser included offenses. The historical evidence about jury nullification was influenced by the fact that it included the results of mandatory death penalty acts which were broadly drafted to include a broad

[1]If the jury is unable to agree, a mistrial can be declared, but a judgment of mistrial in no way prevents the defendant from being retried for the capital offense. Code of Alabama 1975, § 13-11-2(c).

range of crimes. Such historical evidence is also inapplicable to the present case because it was based upon cases brought under statutes which permitted de facto jury discretion rhrough convictions for lesser included offenses.

In summary, Alabama does not have a mandatory death penalty act. Instead, the act has been carefully drafted to insure the reliability of any guilty verdicts obtained under the act. There is no opportunity for the kind of de facto sentencing discretion which has been held constitutionally impermissible. The way the statute is drafted and the operation will not be inflicted in an arbitrary and capricious manner under the statute.

III.

UNDER ALABAMA'S DEATH PENALTY STATUTE THE SENTENCING HEARING IS A WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES NOT A HEARING TO DETERMINE IF AN AGGRAVATING CIRCUMSTANCE EXIST, AND AS SUCH, AGGRAVATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT.

Alabama's Death Penalty Statute requires the trial judge to hold a sentence hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole.[2] The Petitioner contends

[2]Code of Alabama 1975, § 13-11-3

that Alabama's statute should be declared unconstitutional because the State is not required to prove beyond a reasonable doubt the existence of aggravating circumstances necessary to justify imposition of the death penalty at the post sentence hearing.

Alabama's Death Penalty Statute provides that only certain aggravated offenses shall be punishable by death.[3] Thus an individual in Alabama cannot be found guilty of a capital offense and sentenced to death unless at least one aggravating circumstance is found. Since this aggravating circumstance is an element of the crime it must be proven beyond a reasonable doubt.

Alabama's Death Penalty Statute differs from those of Florida[4] and Nebraska[5] in that under the statutes of those two States the aggravating circumstances of the crime are not considered until the sentencing phase of the procedure. Under Alabama's Statute at least one aggravating circumstance must be proven during the determination of guilt phase of the proceedings.

The sentencing hearing under the Alabama Statute involves a weighing of any aggravating and mitigating circumstances surrounding the crime to determine what the appropriate sentence should be. Cook v. State, 369 So. 2d 1251, 1257 (Ala. 1979). The State at the trial has already established an aggravating circumstance which results in the defendant being sentenced to death by the jury. Thus proof

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[3] Code of Alabama 1975, § 13-11-2

[4] Fla. Stat. Ann., § 782.04(1) and § 921.141

[5] Neb. Stat. Ann., § 28-401 and § 29-2520 through 2524.

of an aggravating circumstance at the sentencing hearing is not necessary in order to impose a sentence of death. This is not the case under the Florida and Nebraska Statutes.[6] Thus the requirement under the Nebraska and Florida Statutes that the aggravating circumstances be proven beyond a reasonable doubt during the sentencing hearing would not apply to Alabama's sentencing procedure.

IV.

THE TRIAL JUDGE'S COMPARISON OF THE NATURE OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH WERE SHOWN TO EXIST IN THE INSTANT CASE SATISFIED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial judge in the instant case made a comprehensive finding of facts upon which he based his finding of the existence of three aggravating circumstances. These three circumstances were that the defendant committed the crime for precuniary gain, that the willful killing of the victim was committed by the defendant while he was engaged in kidnapping the victim for ransom, and that the offense was especially heinous, atrocious and cruel (R. p. 1036).

It is clear from the Alabama Supreme Court's decision in Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1979), that the aggravating circumstance of the crime having been committed

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[6] See Footnotes 4 and 5.

for pecuniary gain was not appropriate in this case. Since the Williamson Case, supra, was decided after Cook, however, it is apparent that the Alabama Supreme Court felt that the sentencing process in Williamson satisfied the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

It seems clear from the Alabama Supreme Court's decision in Cook that the aggravating circumstance described in the crime is one of the aggravating circumstances to be considered at the sentencing hearing. In Cook, supra, the Court stated at 1256:

> "We are left with the problem of catergorizing the evidence received and balancing the aggravating circumstances with the mitigating circumstances. At Cook's sentencing hearing the trial judge found that two aggravating circumstances were present: (4)— a capital felony committed in the course of a robbery, and (6)—— a capital felony committed for pecuniary gain. In so finding we feel that the learned trial judge misconstrued the latter aggravating circumstance, in effect condemning Cook twice for the same culpable act —— stealing money. Subsection 6 would, of course, cover a variety of crimes committed with the hope of financial benefit, ranging from 'murder-for-hire' to an heir killing his benefactor to gain his inheritance. But we do not think it appropriate to apply this aggravating circumstance to situations already condemned under subsection 4 which by definition involve an attempt at pecuniary gain. Thus, to avoid repetition, subsection 6 should not be applied to a robbery. The trial court erred in considering it and including it in the findings of fact."

At the sentencing hearing the trial judge must weigh the nature of the aggravating circumstance that was proven at trial and any other aggravating circumstances that may have been proven at the trial or which are proven at the sentencing hearing against any mitigating circumstances which may be shown. In Cook v. State, 369 So. 2d 1251, 1257 (Ala. 1979) the Alabama Supreme Court stated:

> "Once all of the proper evidence has been received at the sentencing hearing and arguments have been given, the trial judge must 'weighing the aggravating and mitigating circumstances' and sentence the defendant to death or life imprisonment without parole. § 13-11-4, Code of Ala. 1975. This 'balancing' should not, however, be construed to authorize a 'tallying' of items for and against the defendant. We can readily envision situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty."

It is clear in the instant case that the trial judge weighed the various aggravating and mitigating circumstances and determined that death was the appropriate sentence (R. p. 1036). The fact that the trial judge did not merely count the number of aggravating and mitigating circumstances and decide what the sentence was to be on the basis of which was more numerous but examined the nature of each circumstance establishes that the sentencing hearing was a meaningful process. Also since the trial judge considered the nature of the aggravating and mitigating circumstances the fact that one underlying aggravating circumstance was considered twice does not make the sentencing process invalid.

V.

THE PETITIONER AFTER HAVING REQUESTED COUNSEL PRIOR TO QUESTIONING BY POLICE WAIVED HIS RIGHT TO COUNSEL BY SIGNING A WAIVER OF RIGHTS FORM AND SUBMITTING TO QUESTIONING BY POLICE.

The United States Supreme Court in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, recognized that an individual held for interrogation must clearly be informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation and that interrogation must cease if the individual states that he wants an attorney. In the present case the defendant was taken into custody by his brother, Jimmy Williamson (R. p. 811). According to the testimony of Jimmy Williamson, he advised the defendant of his rights at the time he took him into custody and that the defendant told him at that time that he wanted an attorney (R. pp. 811-817).

The defendant was taken to the Decatur City Hall by Deputy Jimmy Williamson, and DeKalb County Sheriff Ables. They were met by Detective Robert Clark, Detective Kenneth Collier and Sergeant Doyle Ward (R. p. 756). At that time the defendant's brother, Deputy Jimmy Williamson, was allowed to talk with the defendant for ten to fifteen minutes in the narcotics office (R. p. 757). Deputy Jimmy Williamson testified that when he came out of that office he told Sergeant Ward that the defendant wanted an attorney (R. p.

817). There had been no attempts to question the defendant by any police officer at this time.

Detective Kenneth Collier testified that he and Detective Robert Clerk entered the office where the defendant was located after the defendant's brother came out (R. p. 753). There is no indication that Deputy Williamson told either Detective Clark or Collier that the defendant wished to speak with an attorney (R. p. 753). The defendant was read his constitutional rights by Detective Clark and then the printed form was given to the defendant to read (R. p. 758). After Detective Clark asked the defendant if he understood what he had read and understood what he had been told concerning his rights and the defendant stated he did, the defendant signed the waiver of rights form (R. p. 759). Detective Collier also testified that the defendant was in no way threatened, coerced or made any promise to get him to sign the waiver form (State's Exhibit No. 44).

It appears from the evidence that Detectives Collier and Clark were unaware that the defendant's brother had told Sergeant Ward that the defendant wanted an attorney when they went in to question the defendant. The defendant was informed by Detective Clark of his right to consult with an attorney but according to the testimony of Detective Collier the defendant at no time expressed any desire to speak with an attorney. Also, the defendant signed a waiver of rights form, after his rights were explained to him by Detective Clark.

While the United States Supreme Court in Miranda v. Arizona, supra, recognized that an individual held for interrogation must be advised of his right to consult with counsel before questioning, the court also recognized that

this right may be waived. Also when a person is arrested and asserts his right to counsel, he can change his mind and submit to questioning. United States v. Hodges, 487 F. 2d 945 (Fifth Cir. 1973); Jennings v. United States, 391 F. 2d 517 (Fifth Cir. 1968).

The fact situation in the instant case is similar to that in the Jennings case, supra, in that the two detectives who questioned the defendant were unaware that he had requested an attorney. Detectives Clark and Collier informed the defendant of his rights before they began questioning him and the defendant voluntarily signed a waiver of rights form. It seems clear that the Appellant's confession in the instant case was not induced by any type of promise, express or implied, nor was there any type of inducement given the defendant. The defendant't statement appears to have been voluntarily given and was thus properly admitted into evidence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Respondent's Brief on the Attorneys for Petitioner, Honorable Julian W. Royer, Jr., and Honorable George W. Royer, Jr., by depositing the same in the United States Postal Service, duly stamped and addressed as follows:

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